No. 18-485

IN THE

Supreme Court of the United States

EDWARD G. MCDONOUGH,

Petitioner,

v.

YOUEL SMITH, INDIVIDUALLY AND AS SPECIAL DISTRICT ATTORNEY FOR THE COUNTY OF RENSSELAER, NEW YORK, AKA TREY SMITH,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and in the proper interpretation of a law, like 42 U.S.C. § 1983, that was passed to protect the uniquely federal rights guaranteed by the Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

Twice this Term, parties have asked this Court to resolve 42 U.S.C. § 1983 claims alleging the violation of a federal constitutional right by imposing the rules or elements of a specific common-law tort. In one case, this approach would favor the defendants. *See* Pet'rs Br. 42-48, *Nieves v. Bartlett*, No. 17-1174 (Aug. 20, 2018). Here, it would favor the plaintiff. *See* Pet'r Br. 19-30. In both cases, however, mechanically importing the components of an "analogous tort" into a Section 1983 claim would conflict with Section 1983's text, history, and purpose. This Court should

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

adopt the accrual rule sought by Petitioner, not because "the proper approach is to adopt the limitations rule from the most analogous common law tort," Pet'r Br. 19, but rather because the use of this accrual rule best comports with the nature of Petitioner's constitutional claim and Section 1983's purpose.

Respondent Youel Smith, a state prosecutor, allegedly fabricated evidence of criminal activity against Petitioner Edward McDonough and used this evidence in a pretrial investigation, in grand jury proceedings, and in two criminal trials. Pet'r Br. 2. Due to this malfeasance, McDonough was subject to prolonged criminal proceedings, an ordeal that ended only when his second trial resulted in an acquittal. *Id.* McDonough later sued Smith under Section 1983 for fabrication of evidence, which the court below regards as violating the Fifth and Fourteenth Amendment right to due process of law. Pet. App. 10a.

The gravamen of McDonough's claim is thus "the wrongful initiation and maintenance of criminal proceedings on the basis of fabricated evidence." Pet'r Br. 3. That wrong continued throughout both of his trials and ended only when his acquittal eliminated all prospect of further prosecution. Until that moment, McDonough suffered a continuous deprivation of liberty by virtue of being forced to stand trial. *Id.* at 40-41.

Despite that, the court below concluded that the violation and its harm were "complete" as soon as Smith's fabricated evidence was used against McDonough. Pet. App. 15a. At that point, according to the court, the statute of limitations on McDonough's constitutional claim began to run—meaning that the lawsuit he ultimately filed after his acquittal was untimely. *Id.* at 13a. The court reached this result by applying a "standard rule" of

accrual derived from the common law, under which "accrual occurs when a plaintiff has a complete and present cause of action," or, put another way, "once the plaintiff knows or has reason to know of the injury which is the basis of his action." *Id.* at 9a-10a (citation and quotation marks omitted).

The court below applied this "standard rule" reflexively—without considering the "refinement[s]" to this rule, *Wallace v. Kato*, 549 U.S. 384, 388 (2007), that the common law has developed for torts addressing concerns similar to Petitioner's constitutional claim. And as a result, the court failed to apply the rule that would best serve "the values and purposes of the constitutional right at issue." *Manuel v. City of Joliet*, 137 S. Ct. 911, 921 (2017).

After all, Section 1983 created a new remedy to vindicate the uniquely federal rights guaranteed by the federal Constitution against infringement by state officials. Enacted during Reconstruction as part of "extraordinary legislation," Cong. Globe, 42nd Cong., 1st Sess. 322 (1871) (hereinafter "Globe") (Rep. Stoughton), that "alter[ed] the relationship between the States and the Nation with respect to the protection of federally created rights," *Mitchum v. Foster*, 407 U.S. 225, 242 (1972), Section 1983 was passed to provide "further safeguards" to "life, liberty, and property," Globe 374 (Rep. Lowe). To that end, it enabled individuals to seek damages in the federal courts for deprivations of rights "secured by the Constitution of the United States." Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13.

Critically, Section 1983 did not create "a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, [and] malicious prosecution." *Rehberg v. Paulk*, 566

U.S. 356, 366 (2012). Instead, it furnished "a uniquely federal remedy" for incursions on "rights secured by the Constitution." *Wilson v. Garcia*, 471 U.S. 261, 271-72 (1985) (quoting *Mitchum*, 407 U.S. at 239).

Common-law principles, therefore, "are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'" *Manuel*, 137 S. Ct. at 921 (quoting *Hartman v. Moore*, 547 U.S. 250, 258 (2006)). Thus, the procedural rules governing a particular tort are not to be reflexively imposed on a Section 1983 claim through "narrow analogies." *Owens v. Okure*, 488 U.S. 235, 248 (1989). Instead, when "applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921.

Sometimes, of course, "the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. In such cases, it may be appropriate to apply the tort rules . . . directly to the § 1983 action." *Carey v. Piphus*, 435 U.S. 247, 258 (1978). This is such a case. Where, as here, fabricated evidence was the basis for criminal proceedings that deprived a victim of liberty, the rule that best fits the nature of this constitutional claim is that the statute of limitations begins running only when those proceedings have terminated. This rule also best serves Section 1983's goal of redressing and deterring constitutional violations in a uniform manner.

ARGUMENT

I. Section 1983 Is Meant To Vindicate the Unique Rights Guaranteed by the Federal Constitution, Not the Interests Protected by the Common Law of Torts.

Section 1983, which derives from the Civil Rights Act of 1871, was enacted to create "a private right of action to vindicate violations of rights, privileges, or immunities secured by the Constitution." *Rehberg*, 566 U.S. at 361 (quotation marks omitted). This Act, "along with the Fourteenth Amendment it was enacted to enforce, were crucial ingredients in the basic alteration of our federal system accomplished during the Reconstruction Era," *Patsy v. Bd. of Regents*, 457 U.S. 496, 503 (1982), which established "the role of the Federal Government as a guarantor of basic federal rights against state power," *Mitchum*, 407 U.S. at 239.

The text of what is now Section 1983 left no doubt about the new primacy of "federally secured rights." *Smith v. Wade*, 461 U.S. 30, 34 (1983). It gave any person who was deprived of "any rights, privileges, or immunities secured by the Constitution of the United States" the ability to hold the perpetrator liable, "any . . . law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." 17 Stat. 13; *see* Globe 692 (Sen. Edmunds) (the "solemn duty of Congress" is "to secure to the individual, in spite of the State, or with its aid, as the case might be, precisely the rights that the Constitution gave him").

While the "specific historical catalyst" for this legislation "was the campaign of violence and deception in the South, fomented by the Ku Klux Klan," *Wilson*, 471 U.S. at 276; *see* Globe 158 (Sen. Sherman), Sec-

tion 1983 "'was not a remedy against the Klan or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law.'" *District of Columbia v. Carter*, 409 U.S. 418, 426 (1973) (quoting *Monroe v. Pape*, 365 U.S. 167, 175-76 (1961) (brackets omitted)). The fundamental problem that Congress sought to address, therefore, was not the prevalence of violent acts—the type of individual harms for which state tort law was designed to provide compensation. Rather, the problem was that Southern states, by tolerating this violence, were "permit[ing] the rights of citizens to be systematically trampled upon." Globe 375 (Rep. Lowe).

To address this problem, Section 1983 "interpose[d] the federal courts between the States and the people, as guardians of the people's *federal* rights." *Patsy*, 457 U.S. at 503 (quoting *Mitchum*, 407 U.S. at 242) (emphasis added); *see Carter*, 409 U.S. at 428 (Congress enacted Section 1983 to provide "indirect federal control over the unconstitutional actions of state officials"). Thus, while the violence inflicted on freedmen and their sympathizers "often resembled the torts of assault, battery, false imprisonment, and misrepresentation, § 1983 was not directed at the perpetrators of these deeds as much as at the state officials who tolerated and condoned them." *Owens*, 488 U.S. at 249 n.11.

Accordingly, "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law." *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 685 n.45 (1978). The statute "was designed to expose state and local officials to *a new form of liability*," *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259

(1981) (emphasis added), by providing a remedy for "federally secured rights," *Smith*, 461 U.S. at 34, and would be "supplementary to any remedy any State might have," *McNeese v. Bd. of Educ.*, 373 U.S. 668, 672 (1963). Regardless of what recourse state tort law might provide, "[p]roponents of the measure repeatedly argued that . . . an independent federal remedy was necessary." *Briscoe v. LaHue*, 460 U.S. 325, 338 (1983); *see* Globe 370 (Rep. Monroe) ("life, liberty, and property require *new guarantees* for their security" (emphasis added)).

In sum, Section 1983 provides "a uniquely federal remedy" for incursions upon "rights secured by the Constitution." *Wilson*, 471 U.S. at 271-72 (quoting *Mitchum*, 407 U.S. at 239). With full awareness that it was "altering the relationship between the States and the Nation with respect to the protection of federally created rights," Congress enacted Section 1983 to "protect *those* rights." *Mitchum*, 407 U.S. at 242 (emphasis added); *see* Br. of Constitutional Accountability Center at 5-10, *Nieves v. Bartlett*, No. 17-1174 (Oct. 9, 2018) (providing more detailed account of the history and purpose of Section 1983).

II. Common-Law Rules Are Borrowed To Fill in the Gaps of Section 1983 Only When Those Rules Help Fulfill the Statute's Purpose

A. While Section 1983 authorizes an "action at law," it lacks procedural details concerning the operation of this remedy. *See Wilson*, 471 U.S. at 266; *Owens*, 488 U.S. at 239. Thus, when a plaintiff alleges the violation of a constitutional right under Section 1983, courts "must determine the elements of, and rules associated with, an action seeking damages for its violation." *Manuel*, 137 S. Ct. at 920. This task,

however, is an act "of statutory construction." *Wood v. Strickland*, 420 U.S. 308, 316 (1975).[2]

As this Court has recognized, "Congress intended the statute to be construed in the light of common-law principles that were well settled at the time of its enactment." *Kalina v. Fletcher*, 522 U.S. 118, 123 (1997). That conclusion is premised on the "important assumption . . . that members of the 42d Congress were familiar with common-law principles . . . and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary." *City of Newport*, 453 U.S. at 258. Because Congress "borrowed general tort principles" in crafting Section 1983, *Heck v. Humphrey*, 512 U.S. 477, 484 n.4 (1994), this Court has often filled in the gaps of the statute with "federal rules conforming in general to common-law tort principles," *Wallace*, 549 U.S. at 388.

Crucially, however, "the Court has not suggested that § 1983 is simply a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more." *Rehberg*, 566 U.S. at 366. Instead, it has recognized that "[t]he new federal claim created by § 1983 differs in important ways from those pre-existing torts," most significantly in that "it reaches

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[2] In marked contrast to these procedural omissions, Section 1983 expressly specifies the federal interests it protects—which include, without limitation, "any rights . . . secured by the Constitution." 42 U.S.C. § 1983. On this point, the statute leaves no textual gaps to be filled. Therefore, courts may not shrink the range of constitutional rights protected by Section 1983 in an effort to mimic the scope of the interests protected by state tort law. *See* Br. of Constitutional Accountability Center, *Nieves v. Bartlett*, No. 17-1174 (Oct. 9, 2018).

constitutional and statutory violations that do not correspond to any previously known tort." *Id.* And because the statute has "no precise counterpart in state law," "any analogies to those causes of action are bound to be imperfect." *Id.* (quoting *Wilson*, 471 U.S. at 272).

Accordingly, while this Court "look[s] first to the common law of torts" when "defining the contours and prerequisites of a § 1983 claim," tort principles "are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'" *Manuel*, 137 S. Ct. at 920-21 (quoting *Hartman*, 547 U.S. at 258). The rules governing particular causes of action, therefore, are not mechanically imposed on Section 1983 claims through "narrow analogies." *Owens*, 488 U.S. at 248. Instead, when "applying, selecting among, or adjusting common-law approaches, courts must closely attend to the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921.

Reflecting those principles, this Court's approach has traditionally been to fashion "federal rules conforming *in general* to common-law tort principles," *Wallace*, 549 U.S. at 388 (emphasis added), by calling upon basic, fundamental, and broadly applicable principles of tort law. *See, e.g.*, *Monroe*, 365 U.S. at 187 (Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions"). Reliance on such foundational principles makes sense because they are the ones that "members of the 42d Congress were familiar with" and "likely intended" to apply under Section 1983. *City of Newport*, 453 U.S. at 258; *see, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951) (legislator immunity "was taken as a mat-

ter of course by those who severed the Colonies from the Crown and founded our Nation"); *Briscoe*, 460 U.S. at 334 ("the common law's protection for witnesses is a tradition so well grounded in history and reason that we cannot believe that Congress impinged on it by covert inclusion in the general language before us" (citation and quotation marks omitted)); *Carey*, 435 U.S. at 254-55 ("[t]he cardinal principle of damages in Anglo-American law . . . hardly could have been foreign to the many lawyers in Congress in 1871" (citation and quotation marks omitted)).

Importantly, however, even when importing such foundational principles into Section 1983, this Court has not "mechanically duplicated" their "precise scope." *Rehberg*, 566 U.S. at 364; *see, e.g.*, *Malley v. Briggs*, 475 U.S. 335, 340 (1986) ("while we look to the common law for guidance, we do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form"); *Anderson v. Creighton*, 483 U.S. 635, 644-45 (1987) ("determinations as to the scope of official immunity are made in the light of the common-law tradition," but "we have never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law" (citation and quotation marks omitted)).

That is because "[r]ights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect." *Carey*, 435 U.S. at 254. And critically, "the United States Constitution [and] traditional tort law . . . do not address the same concerns," *Daniels v. Williams*, 474 U.S. 327, 333 (1986), even when they prohibit similar conduct.

B. To be sure, sometimes "the interests protected by a particular branch of the common law of torts may parallel closely the interests protected by a particular constitutional right. In such cases, it may be appropriate to apply the tort rules . . . directly to the § 1983 action." *Carey*, 435 U.S. at 258. Indeed, this is such a case. *See infra*, Part III. "In other cases," however, "the interests protected by a particular constitutional right may not also be protected by an analogous branch of the common law torts." *Carey*, 435 U.S. at 258; *see Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971) ("The interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile."); *Manuel*, 137 S. Ct. at 925 (Alito, J., dissenting) (citing "a severe mismatch" between the Fourth Amendment and the tort of malicious prosecution); *see also* Br. of Constitutional Accountability Center at 19-30, *Nieves v. Bartlett*, No. 17-1174 (Oct. 9, 2018) (explaining that the torts of false imprisonment and malicious prosecution protect different interests than the First Amendment's prohibition on retaliatory arrest).

Where constitutional requirements and the interests they protect do not neatly align with any particular common-law tort, "[t]he purpose of § 1983 would be defeated if injuries caused by the deprivation of constitutional rights went uncompensated simply because the common law does not recognize an analogous cause of action." *Carey*, 435 U.S. at 258. In a Section 1983 suit, after all, the question is not whether the defendant has breached a duty of care imposed by tort law, but rather whether he or she "has conformed to the requirements of the Federal

Constitution." *Owen v. City of Independence*, 445 U.S. 622, 649 (1980).

"In order to further the purpose of § 1983," therefore, "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules . . . themselves were defined by the interests protected in the various branches of tort law." *Carey*, 435 U.S. at 258-59; *see Manuel*, 137 S. Ct. at 921. Because state common-law rules are not fashioned "with national interests in mind," the federal courts must ensure that any reliance on common law "will not frustrate or interfere with the implementation of national policies." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 367 (1977).

C. Consistent with this circumscribed role for common-law rules, even when this Court determines that a particular rule may be appropriate to import into Section 1983, the Court does not do so without first considering "if § 1983's history or purpose counsel against applying it in § 1983 actions." *Wyatt v. Cole*, 504 U.S. 158, 164 (1992).

With respect to damages, for instance, the Court has explained that, in the absence of "specific guidance" from Section 1983's text and history, it "look[s] first to the common law of torts," but only "with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute." *Smith*, 461 U.S. at 34.

Similarly, with respect to immunities, even when this Court determines that "an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871, the Court next considers whether § 1983's history or purposes none-

theless counsel against recognizing the same immunity in § 1983 actions." *Malley*, 475 U.S. at 340 (quoting *Tower v. Glover*, 467 U.S. 914, 920 (1984)). That is because "it would defeat the promise of the statute to recognize any preexisting immunity without determining . . . its compatibility with the purposes of § 1983." *City of Newport*, 453 U.S. at 259.

With respect to statutes of limitations, likewise, this Court has rejected yoking each specific type of Section 1983 action to a corresponding tort, recognizing that "[a]lmost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations." *Wilson*, 471 U.S. at 272-73. Instead, "a simple, broad characterization of all § 1983 claims best fits the statute's remedial purpose" by ensuring that, within each state, a single, predictable statute of limitations will apply. *Id.* at 272.

In sum, this Court consistently eschews reliance on "narrow analogies between § 1983 claims and state causes of action." *Owens*, 488 U.S. at 248. Because those causes of action reflect the concerns of traditional tort law and not the distinct concerns of the U.S. Constitution, *Daniels*, 474 U.S. at 333, this Court has not "mechanically duplicated" their contours under Section 1983, *Rehberg*, 566 U.S. at 364, even when looking to them "as a source of inspired examples," *Manuel*, 137 S. Ct. at 921 (quoting *Hartman*, 547 U.S. at 258).

III. To Advance the Goals of Section 1983, a Constitutional Claim that Fabricated Evidence Was Used To Initiate and Maintain Criminal Proceedings Should Accrue Only When Those Proceedings Have Terminated.

In the decision below, the court mechanically applied a general-purpose accrual rule derived from the common law of torts. Instead of doing so, the court should have first "considered" the "refinement[s]" to this rule that the common law has developed for torts that address concerns similar to Petitioner's constitutional claim. *Wallace*, 549 U.S. at 388. It then should have asked whether adopting any of those refinements would better serve "the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921.

Applying that approach, the result is clear: when a plaintiff challenges "the initiation and maintenance of criminal proceedings based on fabricated evidence, and the resulting deprivation of his liberty," Pet'r Br. 4, the statute of limitations should begin running only when those proceedings have terminated. This rule, an application of the common-law concept of a continuing violation, best fits the nature of Petitioner's constitutional claim. Moreover, adopting that rule here best serves Section 1983's goal of redressing and deterring constitutional violations in a uniform manner.

A. The court below erred by applying a common-law accrual rule without analyzing whether this rule was a proper fit for the constitutional claim at issue.

The court began its analysis with a subtle, but crucial, misstatement of the law. It stated that federal courts "apply general common-law tort principles

to determine the accrual date of a [Section] 1983 claim." Pet. App. 9a (quoting *Spak v. Phillips*, 857 F.3d 458, 462 (2d Cir. 2017)); *see Spak*, 857 F.3d at 462 (citing *Wallace v. Kato* for this point). What this Court has actually said, however, is that federal courts should apply "federal rules conforming *in general* to common-law tort principles." *Wallace*, 549 U.S. at 388 (emphasis added). Behind that subtle difference in wording is a wide gulf in meaning.

The notion that courts should "apply general common-law tort principles," Pet. App. 9a, implies a wholesale adoption of those common-law principles, displacing any further consideration of the unique constitutional right at issue. But this Court's guidance makes clear that the procedural rules governing Section 1983 actions will conform only "in general" to the common law. *Wallace*, 549 U.S. at 388. That important caveat acknowledges what the court below did not: "In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question . . . ." *Carey*, 435 U.S. at 258-59; *accord Manuel*, 137 S. Ct. at 920-21.

This misstatement by the court below compromised its analysis. Instead of using common-law rules as "the appropriate *starting point* for the inquiry under § 1983," *Carey*, 435 U.S. at 258 (emphasis added), the court took those rules to be the end of that inquiry.

Under "the standard rule" for accrual, the court explained, "accrual occurs when a plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." Pet. App.

9a-10a. This rule derives from "common-law tort principles." *Wallace*, 549 U.S. at 388.[3] But the court never carried out the next step in the inquiry: assessing whether this standard rule was a proper fit for Petitioner's constitutional claim, or whether any "refinement" to the standard rule would better vindicate Section 1983's goals. *Cf. id.* at 384 ("There is, however, a refinement to be considered, arising from the common law's distinctive treatment of the torts of false arrest and false imprisonment . . . .").

To be sure, the court acknowledged, and rejected, Petitioner's analogy between fabrication of evidence and the tort of malicious prosecution. But its rejection of that analogy was premised on its assumption that the standard rule applied. *See* Pet. App. 13a (rejecting analogy because "the injury . . . occurs at the time the evidence is used against the defendant"). The court never wrestled with the threshold question of whether this standard rule, or some alternative, should be used when a Section 1983 plaintiff brings fabrication-of-evidence claims like Petitioner's.

By assuming that it should fill in the gaps of Section 1983 by simply plugging in "general common-law tort principles," Pet. App. 9a, the decision below failed to abide by this Court's precedents.

B. Petitioner, for his part, also advocates the wholesale adoption of a common-law rule. Instead of

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[3] *See also id.* (citing for this rule *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 201 (1997)); *Bay Area Laundry*, 522 U.S. at 201 (citing for this rule *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)); *Rawlings*, 312 U.S. at 98 (citing for this rule *Holloway v. Morris*, 182 Ark. 1096, 1099 (1931)); *Holloway*, 182 Ark. at 1099 ("It is well settled that the statute of limitations does not begin to run in any case until there is a complete and present cause of action.").

pointing to general tort principles, however, he argues that "the proper approach is to adopt the limitations rule from the most analogous common law tort." Pet'r Br. 19.

Petitioner at times portrays *Wallace v. Kato* as demanding this approach, Pet'r Br. 19, and some courts have read *Wallace* that way. *See, e.g.*, *Devbrow v. Kalu*, 705 F.3d 765, 767 (7th Cir. 2013) ("we use the rule that applies to the common-law cause of action most similar to the kind of claim the plaintiff asserts" (citing *Wallace*, 549 U.S. at 388)); *Owens v. Balt. City State's Attorneys Office*, 767 F.3d 379, 391-92 (4th Cir. 2014) (same, rejecting argument that "the common law [is] merely the 'starting point' in resolving a statute-of-limitations question in a § 1983 action").

Wallace, however, does not call for inflexible reliance on whatever the nearest tort analog to a Section 1983 claim happens to be. While the decision firmly indicates that courts should "consider" any "distinctive rule[s]" of such torts when selecting the appropriate standard, *Wallace*, 549 U.S. at 389-90, its choice to borrow the rule of a particular tort rested on a determination that this rule served similar interests as the constitutional right at issue. Borrowing from that tort, therefore, would adequately serve the values and purposes of Section 1983.

In *Wallace*, defendants who were accused of an unconstitutional arrest urged this Court to apply the same "standard rule" for accrual that the court below applied here. This Court instead opted to apply the "distinctive rule" governing false imprisonment claims. *Id.* at 389. In doing so, the Court explained that the tort of false imprisonment protects similar interests as the Fourth Amendment's ban on unreasonable seizures:

> That tort provides the proper analogy to the cause of action asserted against the present respondents for the following reason: The sort of unlawful detention remediable by the tort of false imprisonment is detention *without legal process*, and the allegations before us arise from respondents' detention of petitioner *without legal process* . . . .

Id. (citations omitted). Because the common-law rule and the relevant constitutional provision were both meant to remedy the same "sort" of injuries, this tort was a "proper analogy" for the constitutional claim. *Id.*

This Court also noted *why* the common law may have developed this distinctive rule for false imprisonment claims: "the reality that the victim may not be able to sue while he is still imprisoned." *Id.* That acknowledgement further underscored why it was appropriate to apply this rule to plaintiffs like the one in *Wallace*—plaintiffs who likewise may have been unable to sue while still imprisoned.

Petitioner also relies on this Court's decision in *Heck v. Humphrey*. But *Heck* does not call for mechanical reliance on the rules of an "analogous tort" any more than *Wallace* does. This Court there noted that "we look *first* to the common law of torts," which is "'the appropriate *starting point* for the inquiry under § 1983.'" *Heck*, 512 U.S. at 483 (quoting *Carey*, 435 U.S. at 257-58) (emphases added). After examining the elements of the tort of malicious prosecution, the Court adopted one of those elements—favorable termination of the criminal proceedings—as a requirement for similar constitutional claims.

Before doing so, however, the Court assured itself that malicious prosecution was indeed a proper anal-

ogy. Because this tort "permits damages for confinement imposed pursuant to legal process," including "compensation for any arrest or imprisonment," *id.* at 484, it closely matched the plaintiff's constitutional claims alleging abuse of the criminal process to arrest, try, and convict him, *id.* at 479.

The Court also made clear why borrowing the "favorable termination" rule from malicious prosecution would serve the purposes of federal law. That rule "avoids parallel litigation over the issues of probable cause and guilt," and it precludes "collateral attack[s] on the conviction through the vehicle of a civil suit." *Id.* at 484 (citation and quotation marks omitted). These attributes were especially significant in *Heck* because there the Court had to reconcile Section 1983 with the federal habeas corpus statute. *Id.* at 480-81. By exploring "the common-law principle barring tort plaintiffs from mounting collateral attacks on their outstanding criminal convictions," this Court confirmed its belief that Section 1983, "which borrowed general tort principles, was not meant to permit such collateral attack," leaving "habeas corpus [as] the exclusive remedy" for such challenges. *Id.* at 485 n.4, 481.

Heck and *Wallace*, therefore, do not endorse a reflexive adoption of the rules or elements of whatever tort happens to be most analogous to a plaintiff's constitutional claim. Embedded in both decisions was a determination that the constitutional claim at issue truly was analogous to the specific tort from which the Court borrowed, and that applying this tort's rules would further the purposes of Section 1983.

Any doubt or ambiguity on this score has been removed by this Court's subsequent decisions, which reemphasize that Section 1983 is not "a federalized amalgamation of pre-existing common-law claims,"

Rehberg, 566 U.S. at 366, that "any analogies to those causes of action are bound to be imperfect," *id.*, and that, as a result, "[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims," *Manuel*, 137 S. Ct. at 921.

This more nuanced interpretation of *Heck* and *Wallace* also helps ensure the consistency of those decisions with the remainder of this Court's precedent—which has always recognized Section 1983's role as a remedy for uniquely *federal* rights. It is "the purest coincidence" when the common law seeks to protect comparable rights. *Rehberg*, 566 U.S. at 366 (quoting *Wilson*, 471 U.S. at 272). The efficacy of Section 1983 in vindicating constitutional rights cannot hinge on the luck of whether state tort law happens to address similar interests. Indeed, it is precisely where state law is lacking in this regard that Section 1983's remedy is *most* essential.

C. The court below should not, therefore, have "simply adopt[ed] the limitations rule applicable to the most analogous common law tort." Pet'r Br. 2. But neither should the court have applied a "standard rule" of accrual, Pet. App. 9a, without "closely attend[ing] to the values and purposes of the constitutional right at issue," *Manuel*, 137 S. Ct. at 921. Instead, the court should have considered whether any refinements to that standard rule were a better fit for Petitioner's constitutional claim. And that analysis supports the rule sought by Petitioner: a constitutional claim that fabricated evidence was used to initiate and maintain criminal proceedings should not accrue until those proceedings terminate.

Although the standard rule under common-law tort principles is that a limitations period begins "when the plaintiff has a complete and present cause of action," *Wallace*, 549 U.S. at 388, the common law

also recognizes that certain wrongs constitute *continuing violations*. And those violations are governed by a different rule.

The tort of false imprisonment, for instance, "does not consist in a single act, but in a prolonged or continuous violation of personal liberty." 1 Francis Hilliard, *The Law of Torts or Private Wrongs* 200 (3d ed. 1866); *see id.* ("an officer, who illegally imprisons a person, is liable not only for the time he is in the officer's custody, but for all the time of the imprisonment"). Accordingly, "[t]he running of the statute of limitations on false imprisonment is subject to a distinctive rule," commencing only "'when the alleged false imprisonment ends.'" *Wallace*, 549 U.S. at 389 (quoting 2 H.G. Wood, *Limitation of Actions* § 187d(4), at 878 (rev. 4th ed. 1916)). This Court borrowed that distinctive rule in *Wallace* after finding it better suited to the nature of the plaintiff's constitutional claim. *See supra* at 17-18.

The same principle applies here. An official's fabrication of evidence to initiate and maintain criminal proceedings is an ongoing wrong from which the victim is not free until the proceedings have completely terminated. *See* Pet'r Br. 44-50. Just as "[t]he wrong of detention without probable cause continues for the duration of the detention," *Manuel v. City of Joliet*, 903 F.3d 667, 670 (7th Cir. 2018), here too the wrong continued for the duration of Petitioner's trial and retrial. As the court below acknowledged, "[t]he constitutional right violated by fabricated evidence is the right not to . . . face trial based on such evidence." Pet. App. 14a-15a. Petitioner continued to face trial, and thus was deprived of his constitutional rights, until his acquittal ended all prospect of further prosecution. Until that point, he endured "a prolonged or continuous violation of person-

al liberty." 1 Hilliard, *supra*, at 200; *cf.* Pet. App. 10a (acknowledging that Petitioner "suffered a liberty deprivation because of [fabricated] evidence when he . . . stood trial").

Resisting that conclusion, the court below insisted that Respondent's wrongful acts were "complete" as soon as the fabricated evidence was used against Petitioner. Pet. App. 15a. By "complete," the court seems to have meant that Petitioner by then had been legally harmed and was thus entitled to sue. *See id.* But as *Wallace* illustrates, that is not the only consideration. The mere fact that a wrong has *begun* to injure its victim does not mean that the wrong has *ended*. In *Wallace*, after all, the plaintiff "was injured and suffered damages at the moment of his arrest, and was entitled to bring suit at that time," 549 U.S. at 390 n.3, yet the violation did not end—and his claim did not accrue—until later, when he was no longer held without legal process, *id.* at 391.

Respondent's unconstitutional acts were therefore not "complete" at the moment he used fabricated evidence in a way that injured Petitioner. That evidence led to the instigation and the continuation of criminal proceedings. The violation ended only when Petitioner was no longer in legal jeopardy, and thus no longer being deprived of his liberty. "When a wrong is ongoing rather than discrete," as here, "the period of limitations does not commence until the wrong ends." *Manuel*, 903 F.3d at 669.

Borrowing the distinctive accrual rule for continuing violations is appropriate regardless of whether false imprisonment, malicious prosecution, or some other tort is "the closest common law analog" to Petitioner's claim. Pet'r Br. 3. The function of the common law here is to provide "a source of inspired examples." *Manuel*, 137 S. Ct. at 921. Because the con-

tinuation of Petitioner's criminal proceedings based on fabricated evidence was an ongoing violation, akin to the continuation of a false imprisonment, it is proper to draw upon the example of false imprisonment's distinctive accrual rule.

After all, while false imprisonment and malicious prosecution are separate causes of action, the two are "related." *Heck*, 512 U.S. at 484; *see generally* Martin L. Newell, *A Treatise on the Law of Malicious Prosecution, False Imprisonment, and the Abuse of Legal Process* (1892).[4] Together with their variants, these torts formed "a particular branch of the common law," *Carey*, 435 U.S. at 258, addressing the harms that ensue from deprivations of liberty inflicted with inadequate or tainted legal process. *See* Newell, *supra*, § 7, at 9 ("An action will lie against one who has either unlawfully arrested or imprisoned another, or who has falsely, that is unjustly and maliciously, prosecuted him and caused his arrest."). And those harms resemble the harms that the Constitution guards against by prohibiting the use of fabricated evidence in criminal proceedings. *See* Pet. App. 10a ("Under the Fifth and Fourteenth Amendments' Due Process Clauses, individuals have 'the right not to be

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[4] Illustrating the fluid spectrum between these torts, one of their variants, sometimes called "malicious arrest," consisted of making false representations to obtain a judicial order for the arrest and detainment of another person, such as an alleged debtor. *See* 2 C.G. Addison, *A Treatise on the Law of Torts* § 870, at 83 (H.G. Wood ed., 1881); *Ahern v. Collins*, 39 Mo. 145, 150 (1866); *Herman v. Brookerhoff*, 8 Watts 240, 241 (Pa. 1839); *Hogg v. Pinckney*, 16 S.C. 387, 392 (1882). And in suits for malicious arrest, just like in suits for malicious prosecution, courts held that "[t]he new action must not be brought before the first be determined; because till then it cannot appear that the first was unjust." *Cardival v. Smith*, 109 Mass. 158, 158 (1872); *Hogg*, 16 S.C. at 396.

deprived of liberty as a result of the fabrication of evidence by a government officer . . . ." (quoting *Zahrey v. Coffey*, 221 F.3d 342, 349 (2d Cir. 2000))). One need not cast about for a "most" analogous tort, therefore, to conclude that the deferred-accrual rule can, and should, be borrowed in the process of "applying, selecting among, or adjusting common-law approaches" here—a process centered around "the values and purposes of the constitutional right at issue." *Manuel*, 137 S. Ct. at 921.

Indeed, considering the similar accrual rule for the tort of malicious prosecution points in the same direction. As Petitioner emphasizes, such claims do not accrue until the allegedly malicious prosecution has terminated in the plaintiff's favor. This rule, whatever its original rationale, ensures that accrual is deferred as long as a victim remains threatened by the baseless prosecution he seeks to challenge—that is, as long as "the prosecution is persisted in and kept hanging over the head of the plaintiff." 2 Addison, *supra*, § 852, at 65; *see Cardival*, 109 Mass. at 158-59 (in malicious prosecution, "an acquittal by a jury must be shown," and "a *nolle prosequi* entered by the attorney for the government is not sufficient; for . . . another indictment may still be found on the same complaint").

Notably, a person could traditionally be liable for malicious prosecution if he "continued" a criminal proceeding that was initiated by another person without his participation. 2 Addison, *supra*, §§ 857, 872, at 76, 85; 1 Hilliard, *supra*, at 426 ("one may be liable for the continuance of a prosecution, after notice of it, though not commenced by him"); Thomas M. Cooley, *A Treatise on the Law of Torts* 187 (1879) (a witness giving false evidence who was not involved in the decision to commence prosecution can be held lia-

ble if "he interferes improperly afterwards"); *Finley v. St. Louis Refrigerator Co.*, 99 Mo. 559, 13 S.W. 87, 88 (1890) ("[I]t was not vital to plaintiff's recovery that he should show that defendants commenced *and* continued the prosecution maliciously. If he proved that it was *either* so commenced *or* continued by them, it would be sufficient to support his case . . . ." (emphasis added)). As this rule illustrates, a malicious prosecution violation continues throughout the pendency of the prosecution. As such, its accrual rule dovetails with the rule for false imprisonment: so long as a plaintiff's liberty is still being infringed—whether by an unauthorized confinement or by the need to face spurious criminal charges—the statute of limitations does not begin running.[5]

Together, the accrual rules of false imprisonment and malicious prosecution form a distinct alternative to the "standard" rule embraced by the court below. And that alternative provides a better fit for Petitioner's constitutional claim.

D. In addition, applying this alternative rule better serves the "chief goals" of Section 1983, "compensation and deterrence." *Hardin v. Straub*, 490 U.S. 536, 539 (1989); *cf. Burnett v. Grattan*, 468 U.S. 42,

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[5] The court below attempted to distinguish malicious prosecution by stating that "the harm—and the due process violation—is in the *use* of the fabricated evidence to cause a liberty deprivation, not in the eventual resolution of the criminal proceeding." Pet. App. 13a. While that is true, malicious prosecution is no different. After all, malicious prosecution is entirely focused on the *wrongful initiation* of legal proceedings. *See, e.g., Herman*, 8 Watts at 241 ("The gist of the action . . . is the origination of a malicious and groundless prosecution, which *ipso facto* put the party in peril."). Despite the fact that *instigating* a prosecution is the legal wrong, accrual is deferred so long as the party remains "in peril." *Id.*

55 (1984) ("the central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief"). Without this rule, many victims of fabricated evidence will see their causes of action accrue during, or even before, their criminal trials. Forcing such individuals to sue then, or not at all, will inevitably discourage meritorious claims. *See* Pet'r Br. 55-56.

To be sure, the goal of Section 1983 is not simply to allow the most plaintiffs to sue. *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978) ("If success of the § 1983 action were the only benchmark, . . . the appropriate rule would then always be the one favoring the plaintiff . . . ."). But here, without a rule deferring accrual until termination, valid claims of constitutional violations will be discouraged for reasons that do not promote any of the statute's goals. Quite the contrary: the very reason individuals may be afraid to file suit against an offending state official is that they are still at risk of suffering the dire legal consequences of that official's malfeasance. *Cf.* Pet'r Br. 2 (noting that it was Respondent's choice whether or not to try Petitioner a second time). Sanctioning this perverse result would be entirely contrary to "the settled § 1983 policy of deterring officials' unconstitutional behavior." *Hardin*, 490 U.S. at 542.

"There is, of course, a federal interest in disposing of all litigation in the federal courts as expeditiously as possible," but that interest "is vindicated by all statutes of limitations and always must be balanced against the countervailing interest in allowing valid claims to be determined on their merits." *Id.* at 542 n.10; *see Wilson*, 471 U.S. at 272 (adopting an interpretation of Section 1983 that "best fits the stat-

ute's remedial purpose"); *Owen*, 445 U.S. at 636 (the Forty-Second Congress anticipated that Section 1983 would be interpreted broadly to promote its remedial goals).

A deferred-accrual rule is also appropriate here because it promotes "uniformity," one of Section 1983's "subsidiary goals." *Hardin*, 490 U.S. at 539. Under this rule, fabrication-of-evidence claims will never accrue before the relevant criminal proceedings have terminated, and in most cases they will accrue upon termination. (Exceptions may arise where a plaintiff had no way of knowing about the fabricated evidence until later.) By reducing the number of scenarios in which accrual dates hinge on a plaintiff's awareness, or presumed awareness, of a violation, this rule offers greater predictability. A standard accrual date that in most cases cannot seriously be challenged will minimize the "uncertainty and time-consuming litigation that is foreign to the central purposes of § 1983." *Wilson*, 471 U.S. at 272.

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Some cases present difficult choices between promoting the breadth of Section 1983's remedy, ensuring uniformity, and hewing to the common-law principles on which the statute was modeled. Not this case. Here, all three imperatives call for the same result. This Court can borrow a traditional common-law rule, employ that rule in service of protecting constitutional rights, and in the process make the law's application simpler and more predictable. And it can accomplish all this by reaffirming and applying established principles. The Court should do so.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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